Supreme Court of the United States

OCTOBER TERM, 1906.

No. 195.

THE CHICAGO MILWAUKEE AND ST. PAUL RAILWAY COMPANY, Appellant,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS

REPLY BRIEF

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In the Supreme Court of the United States

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THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, *Appellant*, vs. THE UNITED STATES. } No. 198.

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REPLY BRIEF

I.

1. In the true sense of the term, there was no assignment of the claim. The deed conveying to the petitioner all the property of the Milwaukee & Northern Railroad Co., including choses in action, etc., was but an incident of the absorption of the Milwaukee and Northern by this petitioner, or the merger or consolidation of the two companies into

one, bearing the name of the petitioner. For the details, see pages 9 and 10 of the record.

It was not a transfer of this claim by the Milwaukee & Northern Railroad Co., in either the statutory or the ordinary or the strict sense of the term. All the property of the Milwaukee & Northern, and all its rights, privileges and corporate franchises, vested in the petitioner by reason of certain transactions in harmony with the laws of Michigan and Wisconsin. The result was that the Milwaukee & Northern was dissolved, because the petitioner absorbed that company and all its properties and franchises. The petitioner thereby succeeded to the possession of the franchises, rights, privileges, immunities and properties of the Milwaukee & Northern and, therefore, this action is brought by the successor of that company, not by an assignee. By reason of the premises, the petitioner succeeded to all the rights of prosecution, just as an administrator or executor succeeds to the rights to prosecute and collect claims owned by the decedent, and just as a trustee in bankruptcy or an assignee in insolvency succeeds to such rights possessed by the insolvent.

2. Section 3,477, Rev. Stat., was enacted "to protect the Government, and not the claimant, and to prevent frauds upon the Treasury." *Price* v. *Forrest*, 173 U. S., 423, and cases cited.

In that case a receiver was appointed by a court of competent jurisdiction, and this court held, after an elaborate review of all the authorities, that the assignment made to the receiver by the order of the court was not prohibited by the statute. The assignment was but an incident of the receivership and of the collection of the claim, just as the assignment by deed in the case at bar was but an incident in the merger, or consolidation, or absorption, and in the final collection of the claim sued on. In the case at bar, the result was nothing more than the change of corporate entities. When the Milwaukee & Northern went out of ex-

istence, its properties and franchises becoming the property of this petitioner, there was no person, and no other corporation than this one, to present this claim to the Government and demand its collection by legal proceedings, because the Milwaukee & Northern had ceased to exist, its identity being merged in the identity of this petitioner. It follows that the mischief sought to be prevented by Section 3,477, i. e., harrassing the Government by multiplying the number of persons with whom it has to deal, or the danger of enlisting improper influences in advocacy of a claim, cannot exist here. See *Goodman* v. *Niblack*, 102 U. S., 556–560; *Erwin* v. *United States*, 97 U. S., 392–397; *Price* v. *Forrest*, 137 U. S., 421.

Here the merger or absorption of the Milwaukee & Northern is explicitly alleged in the petition, and it is also alleged that the petitioner is the owner of the claim, no part thereof having been assigned or transferred by it in any way. Thus the case is planted on the contract made by the Milwaukee & Northern with the United States, the merger or consolidation of that company with the petitioner, and the ownership of the claim by the latter, coupled with the denial of an assignment or transfer thereof. It is apparent, therefore, that this acquisition of the claim is not among the evils which the statute was designed to prevent, and that the action is being prosecuted by the lawful successor of the Milwaukee & Northern.

In *Erwin* v. *United States*, 97 U. S., on p. 397, this court said that "the passing of claims to heirs, devisees, or assignees, or assignees in bankruptcy, is not within the evil at which the statute aimed." Since then it has been held that the statute does not cover assignments made to trustees in bankruptcy or to a receiver appointed by a court.

We submit that the passing of a claim by reason of a merger or consolidation of corporations, made pursuant to statutory enactment, must fall within the rules laid down in these cases. The basis of such rulings is that there is, after

all, but a change of entity. The former owner of the claim has lost his power to prosecute it. He has lost his physical existence, or his legal existence, or his lawful right to prosecute, and that right has vested in another, just as in the case at bar.

3. This case is not at all like that of the *St. Paul & Duluth Railroad Co.* v. *United States*, 112 U. S. 733. There a mortgage was foreclosed, and then followed a judicial sale conveying the mortgaged property to a purchaser. Not only was the proceeding voluntary from the time of the execution of the mortgage to the completion of the judicial sale, but this court expressly said:

> "We do not find in the mortgage, or decree of sale any term of description, as to the property and interests conveyed, sufficient to pass the interests therein of the Railroad Company to the purchaser at the sale. The same remark applies to the contract itself. The appellant, by virtue of the sale of the railroad and property rights mortgaged, did not become assignee of the contract * * * and can can claim nothing as such in this suit. There are no words of description in the mortgage which include it."

The opinion sets forth at length what was sold, and from the statement it clearly appears that no contracts nor choses in action were covered by the sale. For these reasons, that case is in no sense authority here. Moreover it does not appear in that case that there was any merger, absorption or consolidation, by which the petitioner had acquired the rights, properties and franchises of the company which made the contract with the United States.

II.

1. Section 4,002, Rev. Stats,, authorizes the readjustment

of compensation for the transportation of mails "*on railroad routes*" and enacts, in the second part of the section, that the pay per mile per annum shall not exceed certain rates of pay for certain weights of mail, "*on routes carrying their whole length an average weight*" of certain stated amounts, "the average weight to be ascertained, in every case, by the actual weighing of the mails."

This section prescribes certain definite compensations for certain prescribed average weights. The language of the statute makes definite and certain the maximum amounts to be paid when the average weights *on the whole length of the routes* has been ascertained in the manner prescribed by the section. The language is so positive that it does not stand in need of interpretation. Therefore, and for the sake of the argument, we may eliminate the interpretation put on the section by the Department, although the appellant had the right to rely, not only on the plain and obvious meaning of the statute, but also on the interpretation placed on it by the Department, as in the petition alleged.

It is true that the order incorporated in the notice of February 4, 1890 (Rec., pp. 2, 3), stated that it was made with the understanding that the rate of compensation would be adjusted in a subsequent order, in accordance with the law, for that was but a preliminary or temporary order in the nature of things, being one to "extend service."

It is also true that the notice of December 1, 1890 (Rec., pp. 3, 4), stated that the compensation on Route No. 139,016, between Milwaukee and Champion, had been fixed from September 3, 1890, to June 30, 1891, unless otherwise ordered, under the acts of March 3, 1873, July 13, 1873, and June 17, 1878, upon the returns therein described, at the rate of $162.53 per mile for 164.26 miles. That order also allowed *the same rate* from February 24 to September 22, 1800, for the extension between Republic and Champion. The order was so made as to adjust the rate on the extension from the time it was put in operation

up to September 22, 1890, and to fix the rate for *the entire route* between Milwaukee and Champion from September 23, 1890, to June 30, 1891. In that way the order was made harmonious and all-embracing, just as the statute required. The order concluded with the following sentence: "This adjustment is subject to future orders and to fines and deductions."

We are now to consider what "future orders" could be made according to law. The notice itself speaks of the acts governing the subject, but, had it not done so, it is apparent that the law must govern such matters, for subjects of that importance would not be left to the whim or caprice of an official of the Department.

The act of March 3, 1873, spoken of in the order above referred to, is now Section 4,002, Rev. Stat.

The act of July 12, 1876 (19 Stat., 78), authorize a deduction of 10 per cent from the rate fixed by the first section of the act of March 3, 1873. (Sec. 4002, Rev. Stat.)

The act of June 17, 1878 (20 Stat., 140), further authorised a reduction of 5 per cent per annum from and after July 1, 1878.

The Postmaster-General had no other authority to make "future orders" than such as was granted by these acts. *They made the contract between the railroad company and the United States.*

Now compare the notice of December 3 (Rec., p 4), with the notice of December 1, 1890 (Rec. p. 3). The notice of December 3 does not purport to do anything more than fix the compensation between Republic and Champion, from February 24, 1890, to June 30, 1891, under the acts named, at $132.53, *which is exactly the rate named in the order of December 1, for the whole route.* The later order does not purport to deal with *the whole* of Route No. 139,016, from Milwaukee to Champion, described and dealt with in the order of December 1. The order of December 1 *covered the whole of the line and for all of the time involved.*

The later order purports to deal *only* with the extension of 8.89 miles from Republic to Champion. Every essential feature of the order of December 3 was covered by the order of December 1, and the order of December 3 is therefore unlawful, nugatory, or non-effective. To make it effective, it would have to operate as a complete and lawful invalidation of the order of December 1, and that cannot be without holding that it reduces the rate of compensation on that part of the route between Milwaukee and Republic from $132.53 per mile to the previous rate of $76.35 per mile, although it does not contain such language.

We are brought face to face with the proposition that the Postmaster-General had the right to fix the compensation at $132.53 per mile for the whole route of 264.26 miles, and then reduce the rate on all of the route by naming the same rate for 8.89 miles and saying nothing about the larger part of the route. *This would make the lesser include the greater.* The law does not take cognizance of a part of a route. The statutes made a contract for the whole of the route.

2. Counsel for the United States insists that the railroad companies should have protested against the making of the order of December 3, and should have refused to carry the mails, failing in which the company waived its prior rights and acquiesced in the action of the department.

(*a*) We submit, in the first place, that the order of December 3 is ineffective and unlawful, for the reasons above stated, and that the company was under no legal obligation to pay any attention to it.

(*b*) The law made the contract between the company and the Government, just as much as if it had been put in writing, as was done in the case of *The Chicago & Northwestern Railway Co.* v. *United States*, 140 U. S., 680–686, in which it was held that the company did not waive its rights under the contract or acquiesce in the new proposals of the Postmaster-General, by failing to protest, and that it

was not obliged to protest against his erroneous interpretation of the law.

The case of *The Eastern Railroad Co.* v. *United States*, 129 U. S., 391, is not opposed to this view. There the Postmaster-General made a reduction of 5 per cent as he had the right to do. The company carried the mails without protest or objection, and thereby assented to the rate fixed by the reduction. But it must be noted that the action of the Postmaster-General was lawful and effective, for it covered the whole route, which is not true of the order made in this case, if it can be said that one was lawfully made. Mr. Justice Harlan, who wrote the opinion in that case, showed that the Postmaster-General, by the use of the words "unless otherwise ordered," reserved the power "to exercise the authority conferred, and to conform to the direction given, by the act of 1878," which act (20 Stat., 140), authorized him to reduce the rate of compensation 5 per cent per annum from and after July 1, 1878. The court was dealing with a valid exercise of power with reference to the whole route, because it was made within the terms of the statute. Here, the court is dealing with an unwarranted and invalid exercise of power, because it relates only to part of the route.

Counsel for the Government places great reliance on *Evansville & Indianapolis Railroad Co.* v. *United States*, 32 C. Cls., 555. There the Department fixed the rate of pay from Evansville to Washington, Indiana, at $42.75 per mile. Subsequently the service was extended from Washington to Worthington. Thereafter the rate was fixed between Washington and Worthington, a part of the route, forty miles in length, at the rate of $55.43 per mile between those two points only, not between Evansville and Worthington, the whole route. The mail was carried over the entire route from Evansville to Worthington without protest or objection, and without a further adjustment of pay. The company received the pay at the

several rates between Evansville and Washington and between Washington and Worthington. An action was brought in the Court of Claims for the difference between $42.75 and $56.43, although there had never been an order adjusting the compensation at the latter figure *over the whole line.*

It is apparent that the case at bar is unlike that case in two essential features: First, here was an order fixing the rate *over the whole line*, and which was never changed or attempted to be changed between Milwaukee and Republic: Second, in the Indiana case there were two separate and distinct orders—one for the line between Evansville and Washington, and the other for the line between Washington and Worthington. Therefore, there were two contracts in that case between the company and the United States, and the Government did not attempt to diminish the amount of compensation fixed by either of the contracts. Therefore, it is plain that the company performed its two contracts, took its pay thereunder, without protest or objection, and the Court of Claims was right in holding that it could not recover. The differences between that case and the one at bar are so marked that the opinion of the Court of Claims cannot have any bearing on this case.

Respectfully submitted,

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